

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

IVELISSE BISHCOFF,

Plaintiff,

v.

KILOLO KIJAKAZI,

Defendant.

Case No. 2:21-cv-01707-NJK

**ORDER**

[Docket Nos. 18, 20]

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act. Currently before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 18. The Commissioner filed a response in opposition and a cross-motion to affirm. Docket Nos. 20, 22. Plaintiff filed a reply. Docket No. 23. The parties consented to resolution of this matter by the undersigned magistrate judge. *See* Docket No. 3.

**I. STANDARDS**

A. Disability Evaluation Process

The standard for determining disability is whether a social security claimant has an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(3)(A). The disability determination is made by following a five-step sequential evaluation process. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520, 416.920). The first step addresses whether the claimant is currently engaging in substantial gainful activity. 20 C.F.R. §§

404.1520(b), 416.920(b).<sup>1</sup> The second step addresses whether the claimant has a medically determinable impairment that is severe or a combination of impairments that significantly limits basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). The third step addresses whether the claimant's impairments or combination of impairments meet or medically equal the criteria of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926. There is then a determination of the claimant's residual functional capacity, which assesses the claimant's ability to do physical and mental work-related activities. 20 C.F.R. §§ 404.1520(e), 416.920(e). The fourth step addresses whether the claimant has the residual functional capacity to perform past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f). The fifth step addresses whether the claimant is able to do other work considering the residual functional capacity, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g).

#### B. Judicial Review

After exhausting the administrative process, a claimant may seek judicial review of a decision denying social security benefits. 42 U.S.C. § 405(g). The Court must uphold a decision denying benefits if the proper legal standard was applied and there is substantial evidence in the record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). Substantial evidence is "more than a mere scintilla," which equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, \_\_\_ U.S. \_\_\_, 139 S.Ct. 1148, 1154 (2019). "[T]he threshold for such evidentiary sufficiency is not high." *Id.*

## **II. BACKGROUND**

### A. Procedural History

On April 16, 2019, Plaintiff filed applications for disability insurance benefits, and supplemental security income, with an onset date of January 1, 2013. *See, e.g.,* Administrative

---

<sup>1</sup> The five-step process is largely the same for both Title II and Title XVI claims. For a Title II claim, however, a claimant must also meet insurance requirements. 20 C.F.R. § 404.130.

Record (“A.R.”) 366-375.<sup>2</sup> The Commissioner denied Plaintiff’s claims initially and on reconsideration. A.R. 171-270. *See also* A.R. 278-282, 284-287. On May 5, 2020, Plaintiff filed a request for a hearing before an administrative law judge. A.R. 303-304. On January 7, 2021, Plaintiff, Plaintiff’s representative, and a vocational expert appeared for a hearing before ALJ David K. Gatto. *See* A.R. 57-77. On February 3, 2021, the ALJ issued an unfavorable decision finding that Plaintiff had not been under a disability through the date of the decision. A.R. 36-50. On August 4, 2021, the ALJ’s decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff’s request for review. A.R. 1-6.

On September 15, 2021, Plaintiff commenced this action for judicial review. Docket No. 1.

#### B. The Decision Below

The ALJ’s decision followed the five-step sequential evaluation process set forth in 20 C.F.R. §§ 404.1520 and 416.920 A.R. 36-50. At step one, the ALJ found that Plaintiff met the insured status requirements through June 30, 2016, and has not engaged in substantial gainful activity since the alleged onset date. A.R. 39. At step two, the ALJ found that Plaintiff has the following severe impairments: hypertension, fibromyalgia, spinal disorder, right shoulder disorder, carpal tunnel syndrome, sensorineural hearing loss, diabetes mellitus, bipolar II disorder, psychotic disorder, depressive disorder, anxiety disorder, and somatic symptom disorder. A.R. 39. At step three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. A.R. 39-42. The ALJ found that Plaintiff has the residual functional capacity to

perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) with no climbing of ladders, ropes, or scaffolds; frequent balancing; occasional stooping, kneeling, crouching, and crawling; frequent handling and fingering; frequent pushing and pulling with the right arm; no exposure to temperature extremes, vibrations, wetness, or hazards such as unprotected heights or dangerous moving machinery; and, due to hearing loss, the work would be

---

<sup>2</sup> Plaintiff had filed four previous applications for benefits that were denied. *See* A.R. 172. As to the onset date for the present applications, at the hearing in front of the administrative law judge, Plaintiff amended the alleged onset date for her applications to May 1, 2016. A.R. 36, 60.

performed in an environment with a moderate noise level, such as found in an office or retail setting. Despite mental impairment, the claimant would still be able to understand, carry out, and remember work instructions, use judgment to make work related decisions, and could occasionally interact with supervisors, coworkers, and members of the general public in brief, casual encounters, and adapt to occasional, routine change in a work setting to perform simple work tasks.

A.R. 42. *See also* A.R. 42-48. At step four, the ALJ found Plaintiff is unable to perform any past relevant work as a cashier, cashier II, or change person. A.R. 48. At step five, the ALJ found that jobs exist in significant numbers in the national economy that Plaintiff can perform based on her age, education, work experience, and residual functional capacity. A.R. 48-50. In doing so, the ALJ defined Plaintiff as a younger individual aged 18-49 at the time of the alleged disability onset date, and as having at least a high school education. A.R. 48. The ALJ found the transferability of job skills to be immaterial. A.R. 49. The ALJ considered the Medical-Vocational Rules, which provide a framework for finding Plaintiff not disabled, along with vocational expert testimony that an individual with the same residual functional capacity and vocational factors could perform work as a housekeeping cleaner and merchandise maker. A.R. 49-50.

Based on these findings, the ALJ found Plaintiff not disabled through the date of the decision. A.R. 50.

### III. ANALYSIS

Plaintiff raises a single issue on appeal: that the ALJ erred in the weight he accorded Dr. Short's opinions about Plaintiff's mental limitations, resulting in an improper residual functional capacity determination. Docket No. 18 at 6-9. Plaintiff submits that the ALJ improperly rejected part of Dr. Short's opinion because the ALJ did not state a logical and rational basis for discounting Dr. Short's assessments. *Id.* Specifically, Plaintiff submits that the ALJ erred by expressing concern that Dr. Short used the word "probably" in expressing opinions as to Plaintiff's capability and, therefore, found his opinion only mostly persuasive. *Id.* at 7-8. Plaintiff submits that the ALJ needed to articulate a specific reason beyond this concern for discrediting Dr. Short's opinion that Plaintiff could probably not sustain detailed tasks without special supervision and that, because he did not, the residual functional capacity the ALJ found and the questions he posed to the vocational

1 expert were improper. *Id.* at 8. Plaintiff asks the Court to remand the case for further  
2 administrative proceedings and to direct the ALJ to credit Dr. Short's opinions. *Id.* at 9.

3 In response, the Commissioner submits that the ALJ properly assessed Dr. Short's opinion  
4 and that the weight he afforded it was supported by substantial evidence. Docket No. 20 at 6-13.  
5 The Commissioner submits that the changes to the Social Security regulations, which went into  
6 effect prior to Plaintiff filing her application for benefits, drastically change the manner and  
7 method in which ALJs consider the medical and opinion evidence before them. *Id.* at 6-10. The  
8 Commissioner further submits that the ALJ properly articulated the consistency and supportability  
9 factors required of him when assessing the weight he gave Dr. Short's opinion. *Id.* at 10-11. The  
10 Commissioner submits that the ALJ's determinations as to the weight of Dr. Short's opinion is  
11 supported by substantial evidence because other evidence submitted for consideration supports the  
12 ALJ's findings about Plaintiff's mental limitations and because the ALJ properly considered other  
13 opinions, which Plaintiff does not contest, that contained contradictory findings while crafting the  
14 residual functional capacity. *Id.* at 11-13. The Commissioner asks the Court to affirm the ALJ's  
15 determination that Plaintiff was not disabled and to deny Plaintiff's request for remand. *Id.* at 13.

16 In reply, Plaintiff submits that the ALJ should have provided an articulated reasoning for  
17 the weight he afforded Dr. Short's opinion, particularly since the ALJ was weighing the opinion  
18 evidence of two experts, Dr. Short and Dr. Foerster. Docket No. 23 at 3-4. Plaintiff asks the Court  
19 to reverse the ALJ's decision and remand the case for further administrative proceedings. *Id.* at 4.

20 The Social Security regulations were updated and amended in 2017. The new agency  
21 regulations, effective March 27, 2017, apply to Plaintiff's case. Under these new regulations, the  
22 ALJ will no longer "give any specific evidentiary weight, including controlling weight, to any  
23 medical opinion(s)..." 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, the ALJ must consider  
24 and evaluate the persuasiveness of all medical opinions or prior administrative medical findings  
25 from medical sources. *Id.* When evaluating the persuasiveness of medical opinions, the ALJ must  
26 consider factors articulated in the regulations, including supportability, consistency, relationship  
27 with the claimant, specialization, and "other factors that tend to support or contradict a medical  
28 opinion or prior administrative medical finding," including but not limited to "evidence showing

1 a medical source has familiarity with the other evidence in the claim or an understanding of our  
2 disability program’s policies and evidentiary requirements.” 20 C.F.R. §§ 404.1520c(c)(1)-(5),  
3 416.920c(b)(2). The two most important factors in this assessment are consistency and  
4 supportability and the ALJ must explain how both factors were considered. 20 C.F.R. §§  
5 404.1520c(b)(2), 416.920c(b)(2). The ALJ can, but is not required to, discuss how the other factors  
6 were considered. *Id.* If the medical opinion includes evidence on an issue reserved to the  
7 Commissioner, the ALJ need not provide an analysis of the evidence in his decision, even in the  
8 discussions required by 20 C.F.R. §§ 404.1520c, 416.920c. *See* 20 C.F.R. §§ 404.1520b(c)(3),  
9 415.920b(c)(3).

10 Under the new regulations, a medical opinion is “a statement from a medical source about  
11 what you can still do despite your impairment(s) and whether you have one or more impairment-  
12 related limitations or restrictions in abilities.” 20 C.F.R. § 404.1513(a)(2). Judgments about “the  
13 nature and severity of [a claimant’s] impairments, [his] medical history, clinical findings,  
14 diagnosis, treatment prescribed with response, or prognosis” are all considered “other medical  
15 evidence” under the regulations and are not considered medical opinion because they do not  
16 provide perspectives about the claimant’s functional limitations and abilities. *See* 20 C.F.R. §  
17 404.1513(a)(c), 81 F.R. 62562.

18 Recently, the Ninth Circuit issued guidance regarding the treatment of physicians’ opinions  
19 after the implementation of these revised guidelines. *See Woods v. Kijakazi*, 32 F.4th 785, 2022  
20 U.S. App. LEXIS 10977 (9<sup>th</sup> Cir. 2022). The Court found that its prior case law requiring that  
21 treating and examining physician’s opinions be given particular deference and that opinions be  
22 rejected only for specific and legitimate reasons was irreconcilable with the amended regulations.  
23 *Woods*, 2022 U.S. App. LEXIS 10977, at \*14-15. Instead, the Court held, the ALJ must provide  
24 an explanation supported by substantial evidence when rejecting an opinion. *Id.* at \*15. The  
25 explanation “must articulate how persuasive it finds all of the medical opinions from each doctor  
26 . . . and explain how it considered the supportability and consistency factors in reaching those  
27 findings.” *Id.* (internal citations omitted).

1 Here, in crafting Plaintiff's residual functional capacity, the ALJ considered the opinions  
2 of Dr. Mark Short and Dr. Lisa Foerster, both consultative examiners who specifically wrote  
3 reports as to Plaintiff's four areas of mental functioning. A.R. 47-48. The ALJ also considered  
4 the prior administrative findings of Disability Determination Services consultants. A.R. 46.<sup>3</sup>

5 Dr. Mark Short assessed Plaintiff on March 30, 2022. A.R. 1676-1683. He opined that  
6 Plaintiff "appears to retain sufficient cognitive resources to sustain simple employment . . . and  
7 her mental disorder(s) currently appear to consistently impact her functioning to a moderate  
8 degree." A.R. 1681. In terms of Plaintiff's limitations, Dr. Short opined that Plaintiff would have  
9 "moderate difficulty responding consistently and appropriately to work pressure in a work setting  
10 and working in coordination with and in close proximity to others without conflict, distress,  
11 confusion, or distraction. . . ." *Id.* He further opined that consistent treatment would help lessen  
12 these symptoms. *Id.*

13 As to Plaintiff's specific areas of functioning, Dr. Short opined that Plaintiff "would  
14 probably be able to consistently understand, and to consistently remember, but not consistently  
15 carry out complex and detailed tasks without special supervision." A.R. 1680. He further opined  
16 that Plaintiff "could probably understand and remember simple and most detailed instructions and  
17 could carry out simple but not detailed tasks without special supervision." *Id.* Dr. Short opined  
18 that Plaintiff would "probably" be unable to sustain attention and concentration for most detailed  
19 and complex tasks without special supervision, but that she could "probably" sustain attention and  
20 concentration for simple tasks. *Id.* Finally, Dr. Short opined that Plaintiff only has a mild difficulty  
21 in interacting with supervisors, peers, and the public and appears able to adhere to basic standards  
22 of neatness and cleanliness. *Id.*

23 The ALJ discussed Dr. Short's opinions at length, including highlighting his conclusions  
24 as to Plaintiff's limitations in each of the four areas of mental functioning. A.R. 47. In evaluating  
25 the weight to give Dr. Short's opinions as to Plaintiff's mental limitations, the ALJ found the  
26

---

27 <sup>3</sup> The Court will not discuss at length the ALJ's discussion of the prior administrative  
28 findings, as the parties do not contest any part of his analysis of this evidence. The ALJ found  
these opinions mostly persuasive insofar as the opinions were consistent with the longitudinal  
record as to Plaintiff having moderate mental limitations. A.R. 47.



1 opinion mostly persuasive. *Id.* The ALJ stated that this opinion was mostly persuasive because  
2 some of the opinions Dr. Short proffered about Plaintiff's ability to complete certain tasks were  
3 discussed as "probably," which is not a concrete opinion. *Id.* The ALJ also noted that the record  
4 before him indicates more than a mild social interaction limitation. *Id.* The ALJ concluded that  
5 "insomuch as the . . . limitations correspond to mild-to-moderate mental limitations, they are at  
6 least broadly consistent with the longitudinal record." *Id.*

7 Dr. Lisa Foerster assessed Plaintiff on July 30, 2018. A.R. 572-76. She opined that  
8 Plaintiff "does not have the overall ability to understand, remember, and carry out an extensive  
9 variety of complex instructions..." A.R. 575. She further opined that Plaintiff could understand,  
10 remember, and carry out detailed instructions and simple one-or-two-step instructions. *Id.* Dr.  
11 Foerster opined that Plaintiff could interact appropriately with supervisors and coworkers, but not  
12 with the general public. *Id.* Finally, she assessed that Plaintiff "does not have the ability to  
13 maintain concentration to carry out complex and detailed instructions," but that she does have the  
14 ability to carry out simple instructions. *Id.*

15 In evaluating the opinion evidence provided as to Plaintiff's mental limitations, the ALJ  
16 also discussed the opinion offered by Dr. Lisa Foerster at length. A.R. 48. The ALJ found Dr.  
17 Foerster's opinion to be mostly persuasive. *Id.* In discussing the weight to be afforded to her  
18 opinion, the ALJ highlighted that her opinion as to Plaintiff's interactions with others was  
19 contradicted by the longitudinal record. *Id.* However, the ALJ concluded that "insomuch as Dr.  
20 Foerster's opinion equates to generally moderate mental limitations, it is at least broadly consistent  
21 with the longitudinal record." *Id.*

22 Considering the entire record, the Court finds that substantial evidence supports the ALJ's  
23 determination about the proper weight to afford Dr. Short's opinion as to Plaintiff's mental  
24 limitations. In weighing Dr. Short's opinion, the ALJ specifically highlighted what he found to  
25 be supported by the record before him and what he found consistent with or inconsistent with other  
26 evidence, as required by the Social Security regulations. A.R. 47. The ALJ also discussed the  
27 other evidence in the record he considered, including Plaintiff's own function reports, hearing  
28 testimony, treatment records, and other medical reports. *Id.*



1 Plaintiff's own reports indicate that most of her mental limitations stem from pain and  
2 generally reflect an evaluation that Plaintiff can get along with others, does not handle stress well,  
3 has some difficulty with instructions and attention span, and can finish tasks. *See, e.g.*, A.R. 441-  
4 43, 462-63. Treatment notes consistently report Plaintiff as being cooperative, appropriate in  
5 mood and affect, and expressing normal judgment. A.R. 521, 547, 631, 646, 666, 686, 711, 758,  
6 854, 862, 871, 874, 902, 935, 960, 980, 1062, 1082, 1117, 1143, 1163, 1181, 1196, 1214, 1230,  
7 1255, 1276, 1308, 1667, 1671, 1686, 1688, 1691, 1704. Plaintiff's testimony established that she  
8 occasionally has anxiety attacks, has some problems concentrating, and has depression from her  
9 bipolar disorder that makes it difficult for her to feel motivated. A.R. 65-67. However, while  
10 treatment notes occasionally indicate that Plaintiff has anxiety, the same notes indicate that she  
11 has no associated symptomology, displayed oriented, normal thoughts and mood, and that she is  
12 medicated with Xanax to control her anxiety. *See, e.g.*, A.R. 952, 1011, 1060, 1319, 1372, 1472-  
13 73, 1475, 1479, 1486, 1492-93, 1499, 1506-07, 1512, 1518-19, 1525-26, 1532-33, 1539-40, 1547-  
14 48, 1555-56, 1564-65, 1574-75, 1584-85, 1594-95, 1603-04, 1611-12, 1618-19, 1626-27, 1635,  
15 1642, 1649, 1667, 1686, 1691, 1696, 1723, 1731, 1737, 1744, 1752, 1759, 1767, 1775, 1783.

16 Considering this evidence alongside the opinion evidence offered by Dr. Mark Short and  
17 Dr. Lisa Foerster, the Court finds that it was reasonable for the ALJ to determine that some of the  
18 evidence undermined the opinions offered by Dr. Short and, accordingly, afford the opinion mostly  
19 persuasive weight. The Court finds that the ALJ appropriately discussed how he considered the  
20 supportability and consistency of both Dr. Short's opinion and Dr. Foerster's opinion as required  
21 by the new regulations because, for each opinion, the ALJ offered specific reasons that the opinion  
22 was or was not supported by and consistent with the longitudinal record. The Court further finds  
23 that the ALJ's determination as to Dr. Short's opinion was supported by substantial evidence.  
24 Accordingly, Plaintiff is not entitled to remand on the basis that the ALJ did not properly consider  
25 and weigh the opinion of Dr. Short.

26 .....

27 .....

28 .....

1 **III. CONCLUSION**

2 Based on the forgoing, the Court **DENIES** the motion for reversal or remand (Docket No.  
3 18) and **GRANTS** the countermotion to affirm (Docket No. 20). The decision below is  
4 **AFFIRMED**. The Clerk's Office is instructed to **ENTER FINAL JUDGMENT** accordingly and  
5 to **CLOSE** this case.

6 IT IS SO ORDERED.

7 Dated: June 9, 2022

8  
9   
Nancy J. Koppe  
United States Magistrate Judge